United States Council for International Business

Thomas M.T. Niles, President

1212 Avenue of the Americas, New York, NY 10036-1689
tel: 212-354-4480 ~ fax: 212-575-0327
e-mail: info@uscib.org ~ Internet: www.uscib.org

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February 1, 2002

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: USTR Section 1377 Request for Comments Concerning Compliance with Telecommunications Trade Agreements

Dear Ms. Blue:

The United States Council for International Business ("USCIB") is pleased to have this opportunity to submit comments on the operation and effectiveness of U.S. telecommunications trade agreements pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. Section 3106). The effective implementation of telecommunications trade agreements is of major concern to all of our members.

USCIB, through our International Telecommunications Policy Committee, has worked closely with the Office of the United States Trade Representative and others in the Executive Branch on many U.S. trade initiatives addressing telecommunications, and we greatly appreciate your efforts on behalf of our industry. Our Committee is unique in that it represents all facets of the telecommunications and information services industry -- including international carriers, long distance carriers, incumbent local exchange carriers, competitive local exchange carriers, Internet and value-added service providers, satellite service providers and manufacturers, and equipment manufacturers as well as business users. The Comments submitted herein represent our common concerns in the effective implementation of the WTO Basic Telecommunications Agreement.

As stated in your notice, the purpose of the review is to "determine whether any act, policy, or practice of an economy that has entered into a telecommunications trade agreement with the United States is inconsistent with the terms of such agreement, or otherwise denies to U.S. firms, within the context of the terms of such agreements, mutually advantageous market opportunities."[1] With regard to the WTO Basic Telecommunications Agreement, you seek comments on whether any WTO member is acting inconsistently with its commitments, including the Reference Paper, or with other obligations, including the Annex on Telecommunications, in a manner that affects market opportunities for U.S. telecommunications products and services.

USCIB submits comments on the following countries: China, Colombia, Germany, India, Japan, Mexico, Peru, and South Africa.

[1] *See*, Federal Register, Vo. 66, No. 248, December 27, 2001, p. 66964.

China

Upon its accession to the WTO on December 11, 2001, China undertook commitments to liberalize telecom services. China agreed to a six-year schedule for phasing in direct foreign participation in value-added and basic services. China further agreed to be bound by the obligation in the Reference Paper to establish an independent, impartial regulatory authority and pro-competitive regulatory regime that became enforceable on December 12, 2001. USCIB members welcomed these commitments.

We note further that China has taken a number of positive steps to implement its WTO telecommunications services commitments. Prior to its official accession to the WTO, China abolished outdated regulations and began to develop new regulations, including those governing foreign investment and participation in telecom services. Furthermore, China announced the split of the fixed-line monopoly, China Telecom Group, into separate north and south geographic entities and licensed new operators in an effort to promote domestic competition.

Because China is a large and growing market of great interest to U.S. companies, and recognizing that implementation of sweeping reforms will be difficult, USCIB encourages USTR and others in the U.S. government to place a high priority on working with China to establish a regulatory body that is a separate from, and not accountable to, any basic telecommunications supplier, and that is capable of issuing impartial decisions and regulations affecting the telecommunications sector. Given that the Chinese Government owns and controls all of the major operators in the telecommunications industry, it is inherently impossible for China to establish a regulator that is truly independent. Nevertheless, it is important that the regulatory body be organizationally separate from telecommunications enterprises, as well as from government agencies that are specifically focused on developing the telecommunications industry. Also, it is important that this regulatory body establishes and maintains its impartiality by adopting the following:

- transparent processes for drafting, finalizing, implementing, and applying telecommunications regulations and decisions;
- consistent with the Reference Paper, appropriate measures for the purpose of preventing major suppliers from engaging in or continuing anti-competitive practices;
- a defined process – as it has done for interconnection – to decide commercial disputes in an efficient and fair manner between telecommunications suppliers that are not able to reach mutually acceptable agreements;
- a legitimate process for administrative reconsideration of its decisions; and
- appropriate procedures and authority to enforce China's WTO telecommunications commitments (*e.g.*, the ability to impose fines, order injunctive relief or the payment of damages, and modify, suspend, or revoke a license).

Colombia

On June 14, 2001, Colombia's Congress ratified the Fourth Protocol bringing Colombia to the threshold of implementing its WTO basic telecommunications commitments. However, it has been four years since the agreement came into force and ratification remains before Colombia's Constitutional Court awaiting final approval. To date, the Constitutional Court has not rendered a decision. Colombia's commitments obligated it to open its market for all services effective February 15, 1998, with the exception of certain cellular and mobile services, which Colombia scheduled for opening in 1999. The delayed ratification and implementation of Colombia's obligations have prevented market entry for U.S. carriers inconsistent with Colombia's market access commitments. Implementation not only has been delayed already for four years, but also may be further postponed indefinitely.

Colombia also has failed to implement the Reference Paper that it adopted as part of its schedule. Of particular concern is the lack of transparency or public availability of licensing criteria. In 2000, two years after Colombia's obligations were to have been implemented, the Colombian government (the President and Minister of Communications, respectively) issued decrees opening international carrier services to competition and giving the Ministry the authority to grant licenses. In October 2000, the Constitutional Court declared the decrees unconstitutional on grounds that the Colombian government had failed to properly ratify the Fourth Protocol. The Court's decision had the effect of rendering the decrees setting forth the licensing criteria null and void and revoking all licenses that carriers had obtained thereunder. No licensing criteria are presently published or otherwise available in Colombia. Of further concern is Colombia's failure to establish an independent regulatory authority and a pending Congressional proposal to create a Commission -- to be

staffed by members of the incumbent operator as well as legislators -- to oversee the implementation process and to represent Colombian interests.

Germany

Several of USCIB's members have confronted obstacles in Germany, particularly regarding provisioning of local access leased lines.

With respect to leased lines, U.S. carriers confront delays in obtaining leased lines as well as discriminatory treatment in the provisioning of leased lines by the incumbent to itself or its affiliates. For, example, DT's average delivery interval for the Fourth Quarter of 2001 was 93 calendar days. RegTP did issue a decision in October 2001 after a one-year proceeding relating to the abuse of dominance complaint of Riodata, a competitive carrier in Germany. But that decision only mandated new lead times relating to one specific carrier leased line product, and required only delivery times of between 8 weeks and 6 months, time periods which are far longer than EU best practice values. Moreover, RegTP did not impose any penalties or reporting obligations on DT. This ruling is insufficient in scope and remedy to address U.S. carrier concerns.

We note that in a separate action, WorldCom/UUNET filed last year a complaint with RegTP alleging abuse of a dominant position and discrimination by DT. RegTP's decision is expected in February 2002.

India

Like South Africa, India has not implemented its commitment to provide market access and national treatment to value-added service providers. Under the 1994 WTO GATS, India undertook a commitment to allow non-Indians to establish a commercial presence and own up to 51% of "data and message transmission services." Under the GATS Annex on Telecommunications, India is obligated to provide these value-added service providers access to and use of the underlying public telecommunications networks for the provision of their services. That access must be on "reasonable and non-discriminatory terms and conditions." [2]

As with South Africa, value-added services can generally be provided by leasing lines from the incumbent operator, BSNL that continues to have a virtual monopoly over the domestic telecommunications network. There is some competition to VSNL now allowed in international gateways. But the Government of India has not taken action to ensure that U.S. joint ventures providing value-added services in India have access to the networks of BSNL or VSNL on terms that are "reasonable and non-discriminatory." These dominant carriers each provide value-added services but there do not appear to be rules prohibiting cross-subsidization or any way to ensure that other providers are actually getting access on non-discriminatory terms and conditions.

U.S. providers have established joint ventures in India on the basis of India's commitment to provide market access and national treatment, capped only by a 51% ownership limit. By not forcing the dominant domestic and international carriers to provide access to their network on non-discriminatory and reasonable terms and conditions, India is violating: (1.) Articles XVI and XVII of the General Agreement on Trade and Services (GATS) that mandate market access and national treatment for value-added service providers and (2.) the GATS Annex on Telecommunications. The fact that India did not adopt the competitive safeguards portion of the Reference Paper does not mean that it has no obligation to impose such safeguards. The obligations in the Annex on Telecommunications require those or similar actions – and India has failed to meet those obligations.

Japan

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[2] Annex on Telecommunications, § 5(a).

Japan has made significant improvements in its regulatory regime since the WTO Agreement on Basic Telecommunications went into effect in 1998. Nonetheless, Japan has yet to provide the full market access and national treatment promised for value-added and basic telecommunications services suppliers that it promised. Barriers and discriminatory actions are subtler than previously but still exist.

The inclusion of the Ministry of Posts and Telecommunication in the Ministry of Public Management, Home Affairs, Posts and Telecommunications ("MPHPT") has not eased the practical and bureaucratic obstacles that bedevil U.S. providers of value-added and basic telecommunications services. There remain deficiencies in the regulatory framework, such as vague prohibitions against non-discrimination. Moreover, the rules that exist are subject to selective enforcement or non-enforcement, allowing dominant carriers to invoke or ignore regulatory restrictions as the need suits them.

Problems noted in filings with USTR in 2001 continue to exist. For example, obtaining MPHPT approval of service contracts requires considerable time and effort and MPHPT officials seem to care more about style and format, rather than substance. The review criteria are not transparent and appear to be discriminatory, slowing the commencement of service only of foreign service providers. Similarly, MPHPT continues to show the same bias in favor of NTT, which continues to send its employees to work at the Ministry for a few years.

The Reference Paper, which Japan adopted as an additional commitment in the GATS schedule, imposes an obligation on the regulator to "be impartial with respect to all market participants." In addition, Article VI of the GATS requires impartiality in domestic regulation and a route for "prompt review" of administrative decisions. Japan continues to violate these obligations.

Mexico

USCIB recognizes the major efforts USTR has undertaken to bring Mexico into compliance with its WTO commitments for basic telecommunications services. Efforts to address a wide range of barriers to effective competition, including the lack of effective regulation of Telmex, the need for cost-based interconnection in Mexico, and the removal of anti-competitive cross-border regulations have been extremely important to U.S. companies. Regrettably, however, major problems remain to be resolved concerning Mexico's failure to fully open markets for both international and domestic services. These problems not only have impacted U.S. carriers which have invested hundreds of millions of dollars in Mexican competitive carriers, but, as the second largest U.S. international route, have a clear impact on U.S. business and consumers.

Specifically, in regard to international services, four years after the effective date of the WTO Agreement on Basic Telecommunications, Mexico still has failed to implement its commitments requiring the removal of regulatory barriers to international competition and the provision of cost-based, nondiscriminatory termination rates for cross-border calls. Mexico maintains international regulations that mandate that only one Mexican carrier, Telmex, can determine settlement rates, and requires the use of those rates by all other Mexican carriers. Mexico also prevents the use of alternative commercial arrangements available in many other countries for the origination and termination of switched international traffic over international private lines also known as "international simple resale" or "ISR."[3]

These barriers violate Mexico's WTO commitments and harm U.S. consumers by denying U.S. carriers the ability to avoid high settlement rates on calls to Mexico. U.S. suppliers of cross-border services to Mexico are entitled under the WTO Reference Paper to interconnect these services on non-discriminatory terms and at cost-based rates. The inability of U.S. carriers to obtain reasonable termination charges has caused significant harm for many years to U.S. business and consumers. With no competition or alternative termination methods to reduce U.S.-Mexico cross-border termination rates to cost, U.S. users are in fact subsidizing Mexican carriers since international calling prices to Mexico are artificially high as a result of Mexico's policy.

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[3] The FCC has now authorized ISR on 67 U.S. international routes. *See* www.fcc.gov/ib/isr.html.

Mexico also has not implemented its commitments regarding provision of domestic services in Mexico. U.S. carriers and/or their affiliates still are prevented from providing service on a competitive basis, and continue to be unfairly disadvantaged by the failure of Cofetel, the Mexican regulator, to effectively regulate and enforce its regulations and to ensure that Telmex does not abuse its market power. For example, Cofetel has not enforced the dominant carrier regulations issued on September 8, 2000, and has taken little enforcement action in response to complaints filed by competitive carriers against actions by Telmex. Telmex has appealed these new rules, further delaying their implementation, and it is not clear when the Mexican Courts will resolve these issues.

Cofetel also has not ensured competitors' interconnection with Telmex's network at any technically feasible point, under non-discriminatory terms and at cost-oriented rates as required by the Reference Paper. U.S. carriers seeking to compete in Mexico are disadvantaged by the above-cost domestic interconnection rates they must pay Telmex, particularly "off-net" interconnection charges competitive carriers pay to terminate their customers' long-distance calls in geographic areas not open to long-distance competition or otherwise not served by competitive carriers. The interconnection resolution issued by Cofetel on October 11, 2000 recognized that off-net termination is interconnection and required the establishment of an off-net interconnection rate. Telmex still has not submitted the necessary information and Cofetel has taken no further action on the matter.

Peru

Peru is not in compliance with its obligations under the WTO Basic Telecommunications Agreement. OSIPTEL does not function as an independent regulator as required by the Reference Paper, but is unduly influenced by the dominant wireline operator. The lack of impartial treatment by OSIPTEL manifests itself in virtually all areas of its regulation including payphones, interconnection, and licensing of wireline and wireless services.

There have been instances where the dominant operator has informed other industry participants of decisions adverse to their interests by OSIPTEL before OSIPTEL informed them of such decisions. Similarly the dominant operator breached payphone traffic settlement agreements and retained many millions of dollars as the result of passive enforcement by OSIPTEL. When OSIPTEL imposed per second charging on the dominant operator in 1999 (a requirement imposed on mobile operators in 1996) OSIPTEL did not implement its decision until 18 months later in March 2001. There is also public evidence that a sizable number of persons were engaged at the ministry of transportation and communications while employed by the dominant operator. Such exercise of undue influence by the dominant operator has been facilitated by the lack of transparency in the regulatory decision-making process and no opportunity for public comment on OSIPTEL's proposals. Because of the complaints about the lack of impartiality by OSIPTEL the Peruvian Congress is concluding an investigation into the matter.

As a result of Peru's failure to establish an independent regulator and transparent regulatory procedures, the market opportunities that should have resulted from Peru's schedule of market access commitments have been negatively impacted. U.S. companies are deterred from entering Peru, and those that have entered are suffering from the discriminatory treatment of the regulator.

South Africa

The South African Government has not taken actions to ensure compliance with the GATS Telecommunications Annex governing nondiscriminatory access to and use of underlying public telecom networks for the provision of services, including value-added network services, or VANS.

South Africa committed to open its market for VANS under GATS. Prior to making these commitments, and following their entry into force, U.S. suppliers of VANS enjoyed reasonable and non-discriminatory access to Telkom's network. U.S. companies, in fact, have provided value-added services in South Africa since 1985 to many business enterprises in the banking, brewing, manufacturing, minerals and mining industries. Significantly, leasing lines from the incumbent operator, which has been granted a monopoly by the South African Government, can only provide these services. Absent the Government's enforcement of provisions in the GATS Annex, U.S. companies are denied the opportunity to even continue their existing services let alone expand their value-added networks.

South Africa's failure to ensure that U.S. VANS suppliers receive the public telecommunications facilities they require to provide VANS services in South Africa, and its failure in preventing abuse of market power by the incumbent, violates South Africa's

WTO obligations, which include commitments to provide market access and national treatment for VANS services. (*See* South Africa, Schedule of Specific Commitments, WTO Doc. GATS/SC/78, Apr. 1994, pp. 12-13.) South Africa also is required under GATS Article 8 to prevent a monopoly supplier from acting in a manner inconsistent with South Africa's obligations or from abusing its monopoly position when competing in the supply of a service outside the scope of its monopoly rights. Moreover, under the WTO Annex on Telecommunications, South Africa is required to ensure that non-South African VANS suppliers receive "access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions."

Although USTR has urged the South African Government to "ensure that providers of such services can operate consistent with South Africa's WTO obligations"[4] and specifically "to reinstate and enforce a recent ruling prohibiting Telkom from denying access to VANS without explicit authorization of the regulator,"[5] the South African Government has taken no such action.

Additionally, South Africa recently adopted legislation amending its domestic statute governing the provision of telecommunications services, the Telecom Act of 1996. This legislation raises the following concerns:

- The legislation permits only the second national operator to provide resale services before 2005, and only for a two-year period. This is not consistent with South Africa's WTO commitment to liberalize resale service by 2003. (*See Fourth Protocol to the General Agreement on Trade in Services*, WTO, 15 Apr., 1997, South Africa – Schedule of Specific Commitments, page 2 ("Liberalization of resale services to take place between 2000 and 2003 with authorities to define terms and conditions").

- The legislation would significantly diminish the role of the independent regulator, ICASA, by moving licensing authority from ICASA to the Minister of Communications and by making the Minister, rather than ICASA, responsible for the Universal Service Fund.

- The legislation could be read to award Telkom a monopoly over "the provision, repair and maintenance of equipment located on a customer's premises and any other telecommunications apparatus of any kind." This broad language would potentially cover all customer-premises equipment connected to the telecommunications network, which would greatly impede VANS providers in South Africa, which use this equipment as their means of delivery to, and interaction with, consumer and business users.

In closing, we appreciate this opportunity to provide our views and look forward to our continued work with you on telecommunications trade matters. We would be pleased to provide you additional information if necessary.

Sincerely,

Thomas M.T. Niles

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4 Id.

5 Id., USTR Fact Sheet, Background on the 2001 Section 1377 Review.